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In The

Supreme Court of the United States

October Term, 1993

L. A. GEAR, INC.,

Petitioner,

vs.

THOM McAN SHOE COMPANY, MELVILLE CORPORATION and PAGODA TRADING COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THOM McAN SHOE COMPANY AND MELVILLE CORPORATION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit held as a matter of law that mere affixation of different labels establishes a *per se* defense against liability for trade dress infringement?

2. Whether the Court of Appeals for the Federal Circuit adopted a *de novo* standard of review in reversing the district court finding of likelihood of confusion?

3. Whether the Court of Appeals for the Federal Circuit applied Second Circuit precedent in reviewing the issue of likelihood of confusion?

STATEMENT PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Melville Corporation states that Thom McAn Shoe Company is a division of Melville Corporation. Melville Corporation has no parent and no subsidiaries other than wholly owned subsidiaries.

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STATEMENT OF THE CASE

It is common practice in certain segments of the footwear industry for competitors to manufacture and sell competitive versions of popular, branded shoes. This is true of Petitioner as well as Respondents (A41).

Petitioner, in late September, 1987, began to "show" to prospective customers and take orders for a new high-top sneaker called HOT SHOTS that was intended as a complement to an earlier low-top sneaker called COURT PLAYER (A38-39). HOT SHOTS were first advertised to the trade (as contrasted with consumer advertisements) in November, 1987 in *Footwear News* (A39). Consumer advertisements first appeared in the February, 1988 issues of certain magazines (A40). Television advertising did not start until March, 1988 (A40).

In February, 1988, at about the time that Petitioner's consumer advertising was just starting, buyers for Respondents made a decision to make a similar version of HOT SHOTS (A41). These individuals, who knew of the existence of HOT SHOTS, did make a number of changes, as seen from a comparison of A32-A33 with A34. In addition, the Respondents' versions were marked prominently with the names AEROBIX, MacGREGOR and BALLOONS (A43). Each of these brands are well known to consumers. For example, since 1983 approximately 40,000,000 pairs of BALLOONS shoes in a variety of styles have been sold, representing retail sales of more than $750,000,000 (CAFC App. 1753). The MacGREGOR label, used under license by Respondents since 1988, has been featured on 11,000,000 pairs of shoes enjoying sales at retail valued at $200,000,000 (CAFC App. 1830). AEROBIX brand shoes have been sold in a variety of designs since 1984 with a total of 9,000,000 pairs being sold at a retail figure of $90,000,000 (CAFC App. 1828, 1829).

The Petitioner's HOT SHOTS shoes are sold in a price range from $35-$60 (A44). Petitioner, as a matter of policy, does not sell to discounters, including K Mart. Its shoes are not sold in Thom McAn (A44).

Respondents' AEROBIX shoes sell only at K Mart, at prices between $13 and $18 a pair (A44). The MacGREGOR shoes, also sold only at K Mart, cost between $16 and $24 a pair. The BALLOONS shoes are sold only at Thom McAn at prices ranging from a clearance price of $9 to a retail price of $24 a pair (A45).

At the time Respondents decided to make a competitive product, Petitioner owned no patent rights. The patent issued December 27, 1988 (A46). A cease and desist letter was sent on May 27, 1988. The Complaint was filed September 16, 1988, some three months prior to issuance of the patent (A47).

Thus, the Respondents' decision to adapt the look of the HOT SHOTS shoes was made prior to issuance of the patent and prior to the time that Petitioner had undertaken serious advertising, *i.e.*, prior to the time that the public may have been exposed to Petitioner's product.

Moreover, no evidence was presented that customers purchased Respondents' shoes believing them to be HOT SHOTS (A63). The vast majority of Respondents' sales took place *before* issuance of the patent.

REASONS FOR DENYING THE WRIT

There are three principal arguments which Petitioner asserts on its behalf in arguing that this Court should grant certiorari with respect to that portion of a decision by the Court of Appeals for the Federal Circuit relating to a claim of trade dress infringement under the Lanham Act.

First, Petitioner claims that the Court of Appeals for the Federal Circuit (hereinafter "CAFC") has held that a copier can escape Lanham Act liability as a matter of law, simply by affixing the copier's own label to the copies.

Second, Petitioner argues that the CAFC has applied a standard of review on the issue of likelihood of confusion that is improper, namely, a *de novo* review, not a review under the "clearly erroneous" standard.

Third, Petitioner contends that the CAFC failed to apply Second Circuit precedent (specifically, the *Polaroid* case) on the issue of likelihood of confusion.

As Respondents[1] will illustrate, Petitioner's characterization of the CAFC opinion and holding is inaccurate and misleading. Petitioner has done nothing more than construct a series of "straw men" which it then attempts to topple.

In truth, the CAFC decision did not break new ground requiring Supreme Court intervention or clarification. On the particular facts of the case, the CAFC simply upheld the right of competitors to copy unpatented and uncopyrighted product designs where all the relevant circumstances reveal there is no likelihood of confusion. Far from making any broad or novel pronouncement regarding the efficacy of labels as constituting the sole means of avoiding likelihood of confusion, the CAFC decision merely followed the well-established principles set out by this Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234

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1. This Brief in Opposition is submitted on behalf of Melville Corporation and Thom McAn Shoe Company, who shall be referred to as "Respondents." Pagoda Trading Company, Inc. concurs with the points and arguments herein and, therefore, will not file a separate brief in opposition.

(1964); and *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Moreover, the CAFC applied the clearly erroneous standard of review in reversing the trial court on likelihood of confusion, and meticulously adhered to and applied controlling Second Circuit precedent in analyzing the entire trade dress issue.

I.

THE CAFC REVIEWED SEVERAL FACTORS INCLUDING DIFFERENT LABELS, ALL OF WHICH MILITATE AGAINST LIABILITY FOR TRADE DRESS INFRINGEMENT UNDER SECTION 43(A) OF THE LANHAM ACT.

The CAFC neither stated nor implied that affixation of a label, in and of itself, is sufficient basis for a copier to avoid liability under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). To the contrary, it stated that this is one of a number of factors to be considered, to wit:

> A copier must not only attempt to avoid likelihood of confusion; it must succeed in doing so. Thus, when there is a source-indicating label, the label must be effective to make consumer confusion unlikely, in *light of all the circumstances.* (Emphasis added).

(A26).[2]

The CAFC's reference to "all the circumstances" was not mere rhetoric because the court expressly considered and weighed the salient "circumstances."

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2. Herein, references to "A__" refer to the appendix filed with the Petition. References to the appendix filed herewith, consisting of materials included in the appendix filed with the Court of Appeals for the Federal Circuit, shall be "App. CAFC __."

First, relying on the district court finding, the CAFC observed that the respective shoes of the parties moved in different retail channels (A50).[3] It cited Second Circuit authority finding that sales in different stores is a factor weighing against likelihood of confusion. This is in contrast to the trial court, which cited no precedent on this point and gave no weight to this factor (A63).

Second, the CAFC observed that the respective shoes were sold at significantly different price points, citing Second Circuit authority which holds that price differences aid in avoiding confusion as between competitive products. Again, this contrasts with the trial court which failed to cite authority on this point or to give any weight to this element (A63).

Third, the CAFC observed that the record revealed no dispute by Petitioner that the labels affixed to Respondents' shoes bore famous brand names, well-known in the discount shoe environment and recognized by consumers. Indeed, the BALLOONS shoes of Respondents are sold only at its Thom McAn stores and have been for five years while AEROBIX and MacGREGOR are sold only at K Mart. Sales of all shoes bearing these labels have, over the years, totalled approximately 60,000,000 pairs at a retail value over One Billion Dollars ($1,000,000,000) (App. CAFC 1753, 1828-1830). The trial court gave no weight to this factor. The CAFC noted, on the basis of these facts and the cases, that there is sufficient sophistication of purchasers at discount stores to know they are not buying expensive originals (A27-28).

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3. This factor, and the other factors discussed by the CAFC, are among the factors prescribed for analysis by the Court of Appeals for the Second Circuit in determining likelihood of confusion under the Lanham Act. *See Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961). The CAFC observed that since unfair competition issues are not within its exclusive jurisdiction, they apply the precedent of the regional circuit of the district court, in this case the Second Circuit (A17, n. 5).

Fourth, given the prominence and permanence of Respondents' labels and the fact that these labels were well-known, the CAFC found that this case was distinguishable from the line of Second Circuit precedent relied on by Petitioner and the trial court, such as *Lois Sportswear, U.S.A. Inc. v. Levi Strauss & Company,* 799 F.2d 867 (2d Cir. 1986) and *Le Sportsac, Inc. v. K Mart Corp.*, 754 F.2d 71 (2d Cir. 1985) (A29, A63). In those cases, the labels themselves either were inconspicuous and bore confusingly similar brand names or were labels intended to be discarded.

The CAFC found this case more akin to the line of Second Circuit authority relied on by Respondents involving situations wherein the disputed labels were not similar, namely, *Bose Corp. v. Linear Design Lab., Inc.*, 467 F.2d 304, 309 (2d Cir. 1972) wherein the court found the "presence of [defendant's] name on the product goes far to eliminate confusion of origin"; *Stormy Clime Ltd. v. Progroup, Inc.*, 809 F.2d 971, 974 (2d Cir. 1987) wherein defendant's use of a neck label on clothing, *i.e.*, the customary location where consumers look for such labels, that was not similar to the label of the senior user, was seen as a "significant step to differentiate its products;" and *Bristol-Myers Squibb Co. v. McNeil-P.P.C.*, 973 F.2d 1033 (2d Cir. 1992) wherein confusion between similar packages was found unlikely due to the prominent presence of famous, dissimilar marks on the respective packages.[4]

In its opinion, the CAFC clearly rejects the notion that a junior user can appropriate distinctive trade dress by simply affixing a label identifying the source of the goods. In discussing the

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4. Petitioner claims that the CAFC, without reference to the record, disagreed with the district court's "view" of the "impact" of Respondents' labels (Petition at 17). The CAFC had a very ample record on this point. Indeed, in its discussion of likelihood of confusion, the trial court did not discuss at all the celebrity of the Respondents' labels (A64).

evolution of the law on protection of trade dress, the CAFC quoted from the Second Circuit opinion in *Bristol-Myers*, where the Court of Appeals stated:

> We do not mean to intimate that the distinctive elements of any trade dress may be freely appropriated as long as the junior user clearly identifies the source of the goods.

973 F.2d at 1047 (A22-A23).

It is clear, based on its reference to "all the circumstances" and its express recitation of the language from *Bristol-Myers*, that the CAFC recognizes that labels do not represent a *per se* defense to liability and that other factors, such as the several recited in the opinion (A27-29), must be weighed. Indeed, the CAFC expressly recognized that it is only the presence of established labels on the Respondents' athletic shoes, not *any* labels, that successfully avoids liability:

> Since our determination is premised in part on the fact that BALLOONS, MACGREGOR and AEROBIX are established trademarks, this ruling does not apply to shoe models carrying other labels featuring other marks.

(A29, n. 6).

Petitioner also argues that the CAFC holding "deviates" from this Court's decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*, __ U.S. __, 112 S. Ct. 2753, 2757 (1992) (Petition at 8). In truth, this Court granted certiorari therein to resolve a dispute between circuits on whether trade dress could be protected only upon a showing of acquired distinctiveness (secondary meaning) or, in addition, could be based on a showing of inherent distinctiveness.

The Court decided that trade dress, if inherently distinctive, is eligible for protection under 15 U.S.C. § 1125(a). The grant of certiorari was expressly limited to this narrow question. *Two Pesos, Inc.*, 112 S. Ct. at 2757, n. 6. Petitioner's claim that the opinion of the CAFC is in conflict with the Supreme Court opinion is false. In fact, the CAFC faithfully followed the Supreme Court's instruction, expressly citing *Two Pesos, Inc.* for the very proposition for which it stands (A20).

Petitioner further argues (Petition at 13) that the CAFC decision imposes an undue burden of consumer scrutiny, citing *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1134 (2d Cir. 1979). The argument is specious. Indeed, in the case Petitioner cites, the Court of Appeals affirmed the trial court finding that there was no likelihood of confusion arising from concurrent use of DRIZZLER on golf jackets and DRIZZLE on ladies' coats. Both the trial court and the Court of Appeals emphasized that the second comer prominently featured its own name on the product and in advertising for the product such that confusion was rendered not likely. Neither the CAFC nor the Second Circuit panel expressed any tolerance for confusion of consumers. To the contrary, the overall circumstances revealed that there was no likelihood of confusion.

Petitioner further argues that trade dress protection must be afforded herein because design patent protection is not always available or that such patents "often issue after a product's popularity wanes" (Petition at 13). There is no record citation, no case law and no other support offered for this inaccurate assessment. Indeed, design patent protection is available easily and quickly. In addition, design patent protection and trade dress protection cannot be equated. They protect completely different things and are granted for totally different purposes pursuant to entirely separate statutes. Moreover, trade dress protection is, by law, not to be afforded absent a finding of likelihood of confusion.

The fact that the CAFC found no such likelihood of confusion on the facts here presented does no harm to the common law of unfair competition or the statutory scheme of the Lanham Act. On the other hand, to do anything other than apply the legal standard of likelihood of confusion would do serious harm to *both*. What Petitioner appears to seek is some variant of this standard. That is relief that should not be granted.

In sum, there is no need for the Supreme Court to correct the CAFC's decision on the law of unfair competition. The Federal Circuit's decision should remain undisturbed because it is consistent with the long-established jurisprudence and practice in the fashion industry that even well-recognized ornamental styles of articles of apparel can be freely copied if unprotected by patent or copyright and if properly labeled as to source. This reflects the policy that the public, rich and poor alike, should be able to be in fashion, and therefore that competitors have a need to copy high-priced fashion styles as long as they do not mislead purchasers as to the source of their less-expensive copies. This has been reflected in a venerable line of cases including *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930); *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n.*, 312 U.S. 457 (1941); *Societe Comptoir de l'Industrie Cottoniere Establishment Boussac v. Alexander's Dep't Stores, Inc.*, 299 F.2d 33 (2d Cir. 1962). The whole fashion industry has been built up in reliance on this policy and precedent.

II.

THE CAFC APPLIED THE CLEARLY ERRONEOUS STANDARD OF REVIEW IN REVERSING THE TRIAL COURT.

Petitioner states that the CAFC reviewed the District Court's finding of likelihood of confusing *de novo*. However, the CAFC

never stated that it was reviewing the finding of likelihood of confusion *de novo*. To the contrary, it found, after discussing the trial court's analysis of a number of the *Polaroid* factors, that the trial court committed "clear error":

> Considering all the factors, we conclude that the district court *clearly erred* in holding that purchasers of these BALLOONS or MACGREGOR or AEROBIX athletic shoes would be likely to be confused or deceived or mistakenly think that they were buying the L.A. GEAR athletic shoes, despite the substantial similarity of overall design (Emphasis added).

(A29).

A fair reading of this language leads to the inescapable conclusion that the CAFC applied the "clearly erroneous" standard of review imposed under Fed. R. Civ. P. 52(a).

Indeed, the general tone of the opinion is consistent with this conclusion.[5] For example, on the issue of functionality of the design patent, the CAFC affirmed the finding of the trial court, stating, "Clear error has not been shown on this ruling, which is affirmed" (A7). This seems, on its face, a traditional review under the "clearly erroneous" standard.

With regard to the issue of functionality of the trade dress, the CAFC affirmed the trial court, stating, "We discern no clear error in the district court's ruling that L.A. GEAR's design . . . met the criteria of functionality" (A20). Similarly, in reviewing whether

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5. It is noteworthy that Petitioner makes no charge that the wrong standard of review was applied by the CAFC with respect to any other findings.

Petitioner's trade dress had acquired secondary meaning, the CAFC affirmed the trial court, stating, "On this fact-dependent question, we discern no clear error in the district court's finding . . ." (A21).

In this context, it is evident that when the CAFC reversed the trial court, stating that the trial judge "clearly erred" in finding a likelihood of confusion, it was likewise applying the clearly erroneous standard of review.

Petitioner ignores and, in fact, offers no explanation or refutation of the CAFC's use of the words "clearly erred" in its decision. The Petitioner acts as if the words were never written. Indeed, this language is sufficiently broad that one could conclude that the CAFC in fact was applying the clearly erroneous standard to the whole question of likelihood of confusion, a position favored by Petitioner, as opposed to the standard applied in the Second Circuit. However, in light of the CAFC discussion of the *Polaroid* factors, this is questionable. What is beyond question, however, is the fact that the standard of review utilized by the CAFC is not, in any way, shape or form, a *de novo* review. Thus, the Supreme Court's review is not needed to correct the standard of review applied by the CAFC.

Apparently recognizing the inherent weakness in arguing that the CAFC adopted a *de novo* standard of review, Petitioner offers the back-up argument that the CAFC adopted the Second Circuit standard of review, a standard premised on the notion that likelihood of confusion is a mixed question of fact and law. Under the test applied in the Second Circuit and others, a finding of likelihood of confusion is reviewed by analyzing the trial court's findings on each of the *Polaroid* factors under a clearly erroneous standard. Then, with respect to the ultimate balancing of all the *Polaroid* factors to determine likelihood of confusion, a *de novo* standard of review is applied. Petitioner assets that this standard is inconsistent with this Court's precedents (Petition at 18).

There are several problems with Petitioner's position. First, the Supreme Court has on three previous occasions deemed this to be a subject for which certiorari need not be granted. *See Elby's Big Boy v. Frisch's Restaurants, Inc.*, 670 F.2d 642 (6th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982); *Euroquilt, Inc. v. Scandia Down Corp., et al.*, 772 F.2d 1423 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147 (1986); and *Enco Manufacturing Co., Inc. v. Clamp Manufacturing Co., Inc.*, 870 F.2d 512 (9th Cir. 1989), *cert. denied*, 493 U.S. 872 (1989).

Moreover, there has been no demonstration or attempt to demonstrate that there are practical differences between the Second Circuit treatment of this question and that of the other Courts of Appeals. No one, Petitioner included, has pointed to any difference in the rate of reversal amongst the several circuits on the issue of likelihood of confusion. No one can point to substantive differences amongst the circuits with respect to the protectability of trade dress or in the application of the provisions of the Lanham Act or the treatment of Lanham Act litigants. No one can point to inordinate numbers of claims being made in, transferred to or transferred out of the Second Circuit in hopes of taking "advantage" of or avoiding the so-called different standard of review. In short, the so-called difference is more a difference in appearance, not substance.

Unwittingly, Petitioner appears to concede that the standard of review in the Second Circuit is not significantly different from Supreme Court precedent. It states that unlike the standard of review adopted by the Federal Circuit (allegedly "*de novo*") the Second Circuit standard of review "only" conflicts with Supreme Court precedent to the extent that the ultimate balancing of the *Polaroid* factors is subject to *de novo* review (Petition at 18, n. 17). The word "only" is Petitioner's. The meaning is clear, namely, that the difference Petitioner perceives between the Second Circuit standard of review and the Supreme Court precedent on this subject is minimal.

For its part, the Court of Appeals for the Second Circuit operates with the understanding that its standard of review complies with Rule 52(a). In *Bristol-Myers Squibb Co. v. McNeil P.P.C., Inc.*, at 1043-44, the Second Circuit panel discussed at length the standard of review on the issue of likelihood of confusion, citing the *Euroquilt* case and Justice White's dissent from the denial of certiorari. The court discussed the 1985 amendment to Rule 52(a) that findings of fact not be reversed unless clearly erroneous and stated that each of the *Polaroid* factors should be reviewed under that same standard (*id.* at 1044). Indeed, in *Paddington Corporation v. Attiki Importers & Distributors, Inc.*, No. 92-7348, 1993 WL 210564, n. 6 (2d Cir. 1993), cited by Petitioner, the court confirmed its understanding:

> We therefore follow Brisol-Myers Squibb and apply a clearly erroneous standard, which adjusted the Second Circuit standard to bring it in line with the Federal Rules.

Petitioner's claim that the CAFC substituted its own experience and beliefs for those of the trial court (Petition at 17) is wholly unwarranted. It ignores the court's review of the *Polaroid* factors, namely, the different trade channels through which the respective shoes traveled, significant price differences, the fame of the MacGREGOR, BALLOONS and AEROBIX labels appearing on Respondents' shoes, the prominence of the labels and the sophistication of purchasers to know whether they are buying less expensive versions of the expensive originals (A28-29).

In sum, there is no practical difference among the standards of review applied by the circuits, and no need for Supreme Court review on this issue.

III.

THE CAFC FOLLOWED ALL APPLICABLE SECOND CIRCUIT AND FEDERAL CIRCUIT PRECEDENT AND APPLICABLE LAWS OF CONGRESS.

Petitioner makes much of the fact that the CAFC, in reviewing the trial court's findings on likelihood of confusion, did not state, *in haec verba*, that it was applying the *Polaroid* factors.

Upon review of the decision, however, it is plain that the CAFC did, in fact, apply the *Polaroid* standards. Indeed, almost all the cases relied upon by the CAFC in its consideration of the likelihood of confusion issue are cases that recite and/or refer to the *Polaroid* factors. Moreover, the CAFC properly corrected the trial court's failure to afford any weight to several of its findings of fact concerning some of the more critical *Polaroid* factors. Because the CAFC did not recite the specific *Polaroid* words, the presumption must be, in Petitioner's view, that *Polaroid* was ignored. The argument is specious.

Nowhere does the CAFC even suggest that it was applying its own test on the issue of likelihood of confusion. In fact, the CAFC expressly stated it was applying Second Circuit precedent (A17, n. 5). In discussing the merits on trade dress generally, the CAFC cites none of its own decisions. In fact, the opinion on likelihood of confusion does not contain a single case reference to CAFC precedent. Moreover, with the exception of literally a handful of cases, every citation is to Second Circuit or Supreme Court decisions and the handful of exceptions encompass circuits other than the Federal Circuit. In short, Petitioner strains mightily when it argues that the CAFC applied its own test on likelihood of confusion.

Nevertheless, building on its hollow claim that *Polaroid* was

ignored by the CAFC, Petitioner goes on to argue that the CAFC decision will encourage "blatant forum shopping" because litigants can merely join their Lanham Act claim to Patent Act claims to avoid Lanham Act precedents in their local circuit (Petition at 26). This argument is utterly specious. The relevant *Polaroid* factors wee discussed and analyzed below. Long accepted Second Circuit precedent underlies the CAFC decision on the likelihood of confusion issue. There is simply nothing to support Petitioner's claim that forum shopping has resulted or would result from the CAFC's analysis of the likelihood of confusion issue. Supreme Court review is plainly not warranted on this or any other purported basis advanced by Petitioner.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A — TRIAL TRANSCRIPT - PAGES 1753 AND 1828-1830 FROM JOINT APPENDIX FILED WITH UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[1753]

Q. Have you sold L.A. Gear shoes?

A. No.

Q. Do you know what percentage of Thom McAn shoe sales are of brands of other shoe companies?

A. It's considerably less than one percent.

Q. Is that for women's athletic shoes?

A. Yes.

Q. When did Thom McAn first use the trademark Balloons?

A. August 1983.

Q. Is that mark currently in use?

A. Yes.

Q. On what products?

A. On women's athletic shoes, on girls athletic shoes, on women's sports shoes, women's sandals, women's boots.

Q. How many different shoe styles is the mark Balloons currently used on?

A. Over 200 styles.

Q. And how many pairs of shoes have been sold under the Balloons mark, to date?

A. Approximately 40 million.

Q. What does that represent at retail volume?

A. Approximately seven hundred and fifty million dollars.

* * *

[1828]

Q. When was Meldisco founded?

A. Meldisco was founded in 1961.

Q. Does Meldisco sell shoes under any other mark?

A. Yes, we do. We have Aerobix by Trax. We have Dynakids by Trax. We have Texas Steer. We sell the Jacqueline Smith name. MacGregor. Soho. Bond Street.

Q. How does Meldisco use these marks?

A. Really to identify the shoe in question. We feel that these names are well known in the discount industry.

Q. When did Meldisco first use the mark Aerobix?

A. We first used the name Aerobix in late 1984.

Q. Is that mark currently in use?

A. Yes.

Q. On what product?

A. Full line of women's athletic soles, women's low court, women's high court. Women's joggers, women's aerobic shoes. It's also utilized in the children's athletic department.

Q. How many different shoe styles are currently sold under the mark Aerobix?

A. Approximately ten women's and seven children's.

Q. Do you know how many pairs of shoes in total has been sold by Meldisco under the mark Aerobix to date?

A. Over 9 million pair to date.

Q. Whate does that represent at retail?

[1829] A. Approximately $90 million at retail.

Q. What if any values does the mark Aerobix have to Meldisco?

A. We think it has a great deal of importance to Meldisco. I think the customer understands the name and they understand that this quality associated with the product can be found at the K-Mart stores.

Q. What do you base that consumer understanding on?

Appendix A

A. We think we have tremendous customer loyalty. We have customer repeats. People want to buy the athletics or whatever brand that we are offering to the customer. They would like to purchase it again.

Q. When did Meldisco commence the use of MacGregor?

A. MacGregor was first used in early 1985.

Q. Can you tell us how Meldisco came to use MacGregor?

A. Meldisco was looking to get into the branded athletic business at the time and MacGregor was a well known name, synonymous with quality, synonymous with sporting goods, and this was an instant way for Meldisco to get into business in this branded category.

Q. Do you own the trademark MacGregor?

A. No, we don't own it. It's a licensed name and we give them a certain percentage of the retail on the shoe.

Q. Is the MacGregor trademark currently in use by [1830] Meldisco?

A. Yes.

Q. On what products?

A. Men's and women's and children's athletic shoes.

Q. How many different shoe styles currently bear the MacGregor mark?

A. Approximately 20.

Q. Do you know how many pairs in total have been sold by Meldisco to date bearing the mark MacGregor?

A. Over 11 million pair, representing almost 200 million at retail.

Q. What if any value does the MacGregor mark have to Meldisco?

A. We think, again, it has a great deal of value to Meldisco. We think the customer recognizes the name MacGregor synonymous with —

MR. HOROWITZ: Your Honor, I move to strike the last part of that answer as unresponsive.

THE COURT: Strike it. Listen to the question.

Q. Do you believe that the MacGregor mark has value to Meldisco?

A. Yes.

Q. What do you base that on?

A. We base it on the fact that we actually — that customers understand the name MacGregor, that it is

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